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August 28, 1998

Mr. William F. Caton
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Missouri Petition for Preemption of Section 392-410(7) of the Revised Missouri Statues of Missouri, CC Docket No. 98-122

Dear Secretary Caton:

Enclosed are an original and twelve (12) copies of the Reply Comments of the Missouri Municipals in the Petition referenced above. An additional copy is being delivered to Janice M. Myles of the FCC's Common Carrier Bureau and to the International Transcription Service, Inc.

Sincerely,

Lana Meller

cc: Counsel of Record

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
The Missouri Municipal League;	)	
The Missouri Association of Municipal Utilities;	)	
City Utilities of Springfield;	)	
City of Columbia Water & Light;	)	CC Docket No. 98 - 122
City of Sikeston Board of Utilities.	)	
	)	
Petition for Preemption of	)	
Section 392.410(7) of the	)	
Revised Statutes of Missouri	)	
	)	

REPLY COMMENTS OF THE MISSOURI MUNICIPALS

In these comments, the Missouri Municipals respond to the opening comments of the Attorney General of Missouri, GTE Service Corporation, the National Telephone Cooperative Association ("NTCA") and Southwestern Bell Telephone Company (collectively "the Incumbents").[1] As shown below, the Incumbents rely heavily on broad generalities about state sovereignty and private enterprise but either acknowledge or fail to oppose most of the Missouri Municipals' main arguments. When the Incumbents do take issue with points in the Petition, their counter arguments are incorrect, incomplete and misleading, or irrelevant. The Commission should therefore grant the Petition promptly, in clear, forceful and unmistakable terms.

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[1] We treat the State of Missouri as an Incumbent for the purposes of these comments because the Attorney General of Missouri has adopted Southwestern Bell's comments.

I. THE INCUMBENTS CONCEDE THE MISSOURI MUNICIPALS' MAIN POINTS

The Incumbents either expressly confirm, or conspicuously ignore, the following ten key points in the Missouri Petition:

1. The Incumbents openly acknowledge that Section 392.410(7) of the Revised Statutes of Missouri ("HB 620") is an explicit barrier to entry that applies solely to municipalities and municipal electric utilities.

2. The Incumbents argue that the Missouri legislature acted reasonably in enacting HB 620, but none of the Incumbents maintains that HB 620 is "competitively neutral," consistent with the Telecommunications Act's universal service provisions, or "necessary" to achieve any of the public interest goals enumerated in Section 253(b).

3. The Incumbents do not dispute that the Commission applied an "express statement" standard in issuing the *Texas Order*, despite the Supreme Court's rejection of such a standard in *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1990). The only Incumbent that even addresses this issue – NTCA – does not mention *Ashcroft* at all but simply suggests that it was "reasonable" for the Commission to look for an express statement of congressional intent. NTCA's Comments at 4.

4. None of the Incumbents interprets the term "entity" in Section 253(a) in context, with due regard for its placement and purpose in the statutory scheme. None analyzes the language before and after the word "entity" in Section 253(a). None discusses the relationship between Section 253(a) and the other subsections of Section 253. None focuses on Congress's careful scheme of providing for joint federal and state responsibility in sections 251, 252 and 254 of the Act and of sharply curtailing state discretion in Section 253.

5. None of the Incumbents addresses the point that Congress demonstrated in Section 224 of the Act that it was well aware of how to distinguish "political subdivisions" and "instrumentalities" of a state from private entities when it wanted to do so.

6. None of the Incumbents discusses *Salinas v. United States*, 118 S.Ct. 469, 473 (1997) (analyzed at page 30 of the Missouri Petition), in which the Supreme Court held that Congress's use of the modifier "any" in an "expansive, unqualified" way "undercuts the attempt to impose [a] narrowing construction," creates no ambiguity about congressional intent, and satisfies *Ashcroft*'s "plain statement" rule.

7. None of the Incumbents deals with the striking similarity between *Salinas* and the Commission's own analysis in paragraph 40 of the *Pole Attachment Order* (noted at pages 18-19 of the Missouri Petition), in which the Commission found that "the use of the word 'any' precludes a position that Congress intended to distinguish between wire and wireless attachments. . . . The use of 'any' in Section 3(44) precludes limiting telecommunications carriers only to wireline providers."

8. None of the Incumbents attempts to reconcile its position with the "overriding" goals of the Telecommunications Act -- to allow "*all* providers to enter *all* markets"[2] and to remove barriers that prevent consumers from choosing telecommunications providers "from as wide a variety of providers as the market will bear."[3]

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2 *In the Matter of Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, CCBPol 96-10, Memorandum Opinion and Order, ¶ 25, 11 FCC Rcd 13082 (1996) ("*Classic Telephone*"), quoting *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325, ¶ 4 (rel. August 8, 1996) ("*Interconnection Order*") (emphasis added).

3 Statement of William E. Kennard Before the Senate Subcommittee on Antitrust, Business Rights, and Competition (March 4, 1998), Attachment A to the Missouri Petition.

9. None of the Incumbents addresses the point that allowing states to erect barriers to municipal telecommunications activities would undermine Congress's intent to preserve the competitive balance in the electric power industry.

10. None of the Incumbents offers more than a cursory response to the Missouri Municipals' extensive analysis of the legislative history of Section 253, particularly the history of the 103rd Congress, in which virtually all of the substantive issues underlying Section 253(a) were resolved. The Attorney General of Missouri and GTE do not discuss the legislative history at all. NTCA vaguely accuses the Missouri Municipals of citing only the portions of the legislative history that support their conclusions, but it does not explain its accusation or give any examples of alleged omissions or mischaracterizations by the Missouri Municipals. NTCA's Comments at 5. Southwestern Bell completely ignores the 103rd Congress.

By conceding the points noted above, the Incumbents have effectively acknowledged that the Petition should be granted. None of the counter arguments that Incumbents make, to which we now turn, requires a different result.

II. THE COMMISSION HAS JURISDICTION OVER THE MISSOURI PETITION

According to the Attorney General of Missouri, the Commission has no jurisdiction to decide the Missouri Petition because it raises "purely legal" constitutional questions pertaining to "the powers of a municipality under Missouri law." Attorney General's Comments at 1-2. Such issues, he contends, should be decided in a courtroom, preferably one in Missouri. *Id.* at 2. This argument is inconsistent with the plain terms of Section 253(d) and with the process for deciding preemption cases that the Commission outlined in the *Texas Order*.

In Section 253(d), Congress expressly gave the Commission jurisdiction to entertain and decide preemption cases:

> (d) PREEMPTION - If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

In the *Texas Order*, the Commission set forth the following description of the process that Section 253 requires the Commission to apply in deciding preemption cases:

> *[W]e first determine whether the challenged law, regulation or legal requirement violates the terms of section 253(a) standing alone.* If we find that it violates section 253(a) considered in isolation, we then determine whether the requirement nevertheless is permissible under section 253(b). If a law, regulation, or legal requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), we must preempt the enforcement of the requirement in accordance with section 253(d). If, however, the challenged law, regulation or requirement satisfies subsection (b), we may not preempt it under section 253, even if it otherwise would violate subsection (a) considered in isolation. This is consistent with the approach taken in prior Commission orders addressing section 253.

Texas Order, ¶ 42 (emphasis added).

In this proceeding, the Commission must first determine whether HB 620 violates Section 253(a). To do that, the Commission must necessarily decide whether Congress intended to include municipalities and municipal electric utilities among the entities that Section 253(a) protects from state and local barriers to entry and whether HB 620 poses such a barrier.

That the Commission may merely be "an agency of the executive branch of government," Attorney General's Comments at 2, does not detract from its ability to answer the questions posed by the Missouri Petition. Indeed, under *Ashcroft*, the issue before the Commission is not whether *it* believes that HB 620 should be preempted, but whether *Congress* has spoken to that issue with sufficient clarity to make it "plain to anyone who reads the Act" that Congress intended to preempt measures such as HB 620. In this context, the Commission is merely Congress's instrument for carrying out its intent to preempt, as a court would have been if the Missouri

Municipals had sought a judicial determination in lieu of a preemption order from the Commission.

In any event, if the Attorney General believes that judicial review is essential, he can file a petition for review with the appropriate federal court of appeals if he is dissatisfied with the Commission's decision. There is no jurisdictional problem here.

III. THE MISSOURI PETITION IS NOT PROCEDURALLY DEFECTIVE

GTE maintains that the Missouri Petition is no more than a collateral attack on the *Texas Order*. According to GTE, the Petition raises "no new public issues which were not dealt with in the Texas Order" and must therefore be treated as an untimely "request for reconsideration" under Section 1.106 of the Commission's rules. GTE's Comments at 4-5. These arguments are incorrect.

To be sure, the Texas case and this case are similar in some respects. They also differ in significant ways. This case involves a different statute, different parties, different facts and several different issues. In particular, the Commission expressly declined to determine the rights of municipal electric utilities in the Texas case but will have to do so here. See, *Texas Order* at ¶ 179. There have also been a number of new developments since the Commission issued the *Texas Order*.

GTE insists that these distinctions do not matter. That claim, however, is essentially an argument on the merits with which the Missouri Municipals disagree. The Commission will have to decide. If in the course of doing so the Commission concludes that it erred in the *Texas Order*, it will not only have the right, but also the duty, to correct that error. Nothing in the Commission's procedural rules requires petitioners to treat Commission precedents as immutable.

Furthermore, as discussed in the Reply Comments of the American Public Power Association in Support of the Missouri Petition for Preemption ("APPA's Reply"), the Commission has recently made two concessions in the appeal of the *Texas Order* that are pertinent here. One is that the Commission has never focused on the legislative history of Section 253. The other is that parties to new preemption proceedings may appropriately question whether the *Texas Order* can be reconciled with subsequent Commission reports, decisions and orders.[4]

In short, there are no procedural irregularities that preclude the Commission from considering the Missouri Petition.

IV. THE INCUMBENTS HAVE FAILED TO REBUT THE MISSOURI MUNICIPALS' SHOWING THAT THE TERM "ANY ENTITY" IN SECTION 253(a) MEETS *ASHCROFT*'s "PLAIN STATEMENT" TEST

With differing levels of detail and vehemence, the Incumbents all argue that the Commission decided the *Texas Order* correctly. GTE insists that a decision in favor of the Missouri Municipals would unduly intrude upon state sovereignty and raise "grave [c]onstitutional concerns." GTE's Comments at 6. Citing *Ashcroft* and three cases applying it, Southwestern Bell argues that the Commission cannot conclude that Section 253(a) applies to municipal entities because the Communications Act "contains nothing like the plain statement on which courts have consistently relied in other statutes." Southwestern Bell's Comments at 15-19.[5] NTCA contends that two of the key cases on which the Missouri Municipals rely support the Commission's decision in the *Texas Order* -- *Alarm Industry Communications Council v.*

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[4] In making this point, the Missouri Municipals do not concede the Commission's argument that its post-*Texas Order* reports, decisions and orders may not be considered in the Texas appeal.

[5] The Attorney General of Missouri, confirming that Southwestern Bell wields vast power in Missouri, aligns the State with, and adopts, Southwestern Bell's comments as the State's own. Attorney General's Comments at 2, 6.

Federal Communications Comm'n, 131 F.3d 1066 (D.C. Cir. 1997) and *Bell Atlantic Telephone Companies v. Federal Communications Comm'n*, 131 F.3d 1044 (D.C. Cir. 1997). NTCA's Comments at 3-4. None of these arguments has merit.

A. GTE's "Grave Constitutional Concerns" Are Baseless

This case does not present *any* constitutional issues, much less "grave [c]onstitutional concerns," as GTE contends. As the Commission recognized in the *Texas Order*, Congress has constitutional authority to preempt even "traditional" or "fundamental" state functions, and the only issue in cases involving such functions is whether Congress has expressed its intent to preempt clearly enough to satisfy *Ashcroft's* "plain statement" test. *Texas Order*, ¶¶ 181, 187. Assuming (without conceding) that this is such a case, it is nothing more than a simple case of statutory construction.

Furthermore, the Commission stated in *Classic Telephone* that there is no tenth amendment constitutional question raised by Congress' federal preemption directive in Section 253:

> We note that contrary to Bogue's arguments, the Tenth Amendment of the U.S. Constitution is not offended by federal preemption pursuant to section 253. Section 253 explicitly preempts state and local legal requirements. In this situation, pursuant to the Supremacy Clause of Article VI of the Constitution, federal law governs.

Classic Telephone at ¶ 50.

B. Southwestern Bell's Cases Refute Its Arguments

Southwestern Bell's analyses of *Ashcroft* and the three other cases on which it relies are seriously flawed. At the outset, Southwestern Bell has plainly misread *Ashcroft*. Contrary to Southwestern Bell's interpretation, the Supreme Court did not hold in *Ashcroft* that to include state judges among the employees covered by the 1974 amendments to the Age Discrimination

Employment Act of 1967, Congress "would have had to do so *explicitly*." Southwestern Bell's Comments at 15 (emphasis added). To the contrary, the Supreme Court appeared to go out of its way to make clear that "[t]his does not mean that the Act must mention state judges explicitly, ... But it must be plain to anyone reading the Act that it covers state judges." *Ashcroft*, 501 U.S. at 467 (citations omitted).

Also, *Ashcroft* did not involve a statute in which Congress had used the term "any" expansively to modify the term in issue. When the Supreme Court addressed such a statute in *Salinas*, it found that Congress's use of "any" in an "expansive, unrestricted" way "undercuts the attempt to impose [a] narrowing construction," creates no ambiguity about congressional intent, and satisfies *Ashcroft*'s "plain statement" rule. *Salinas*, 118 S.Ct. at 473. Southwestern Bell's conspicuous failure even to mention *Salinas* underscores the frailty of its position.

In Southwestern Bell's second case, *Pennsylvania Dep't of Corrections v. Yeskey*, 118 S.Ct. 1952 (1998), the Supreme Court found that the Americans with Disabilities Act ("ADA") covers state correctional facilities. As Southwestern Bell observes, the Court had no trouble finding that *Ashcroft's* "plain statement" rule was satisfied because the ADA covers public entities and defines that term to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." Southwestern Bell's Comments at 16, quoting Yeskey, 118 S.Ct. at 1954-55, quoting 42 U.S.C. § 12131(1)(B) (inner quotes omitted). Southwestern Bell fails to note, however, that Pennsylvania's main argument was that the ADA should not be read so broadly as to cover all programs within the State's correctional system, including the "boot camp" program in issue. On that issue, the Third Circuit had ruled that,

> To be sure, when "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 461, 111 S.Ct. 2395, 2400, 2401, 115 L.Ed.2d 410 (1991)

> (internal quotation marks and citations omitted). This requirement, however, is a "rule of statutory construction to be applied where statutory intent is ambiguous." *Id.* at 470, 111 S.Ct. at 2406. It is not a warrant to disregard clearly expressed congressional intent.
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> *Torcasio* [*v. Murray*, 57 F.3d 1340 (4th Cir. 1995)]'s statement that Congress must specifically identify state or local prisons in the statutory text, if it wishes to regulate them, was expressly disavowed by the Supreme Court in *Gregory*. *See id.* at 467, 111 S.Ct. at 2404 ("This does not mean that the Act must mention judges explicitly."). Congress need only make the scope of a statute "plain." *Id.* And Congress has done that here. *Both Section 504 and Title II speak unambiguously of their application to state and local governments and to "any" or "all" of their operations. In light of the clear and all-encompassing language of both statutes, there is no basis for requiring Congress to have detailed which of the many important components of state and local governments were to be included in the terms "any" and "all."*

Yeskey, 118 F.3d at 173 (emphasis added). The Supreme Court affirmed. It is the emphasized language above that is relevant here.

Southwestern Bell's third case, *Commonwealth of Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997), not only does not support Southwestern Bell's position but affirmatively undermines it. *Commonwealth of Virginia* involved a dispute about the roles of the federal government and the states in administering the Clean Air Act ("CAA"). Under that Act, the federal Environmental Protection Agency ("EPA") has authority to establish national ambient air quality standards, and the states have primary authority to implement the national standards in any way they deem appropriate. If the EPA finds that a state's implementation plan is inadequate, it can require the state to revise the plan "as necessary" to correct inadequacies. *Commonwealth of Virginia* at 1406-10. The dispute arose when the EPA did not merely reject the plans of certain eastern states to meet national air quality standards for ozone but required the states to adopt the same implementation plan that California had adopted. When the states brought suit, the EPA claimed that the term "as necessary" gives it authority to require the states to adopt the California program.

In resolving the dispute, this Court traced the evolution of CAA since its origins more than a quarter of a century ago. The Court found that, throughout this period, states had had the right to adopt whatever mix of emissions limitations best suited their particular situations, so long as the overall result was compliance with the national standards. The Court also found that the portion of the CAA that gives the states this right was still present in the law, and that the term "as necessary" had come into the CAA in 1990, through amendments that had changed only the syntax, and not the substance, of the Act. *Commonwealth of Virginia* at 1408-10. The Court therefore rejected the EPA's broad interpretation of "as necessary," holding that that term should be read as merely giving the EPA the ability to require narrow corrections to specific problems, without having to subject states to wholesale revisions of their implementation plans. *Id.* at 1410. To agree with the EPA, the Court concluded, "[w]e would have to see much clearer language to believe a statute allowed a federal agency to intrude so deeply into state political processes," citing *Ashcroft*. *Id.*

Commonwealth of Virginia differs from this case in at least three significant respects – (1) the CAA uses the inherently ambiguous term "as necessary," whereas Section 253(a) of the Telecommunications Act uses the expansive, unrestricted term "any entity;" (2) the CAA gives states primary responsibility and broad discretion in developing their implementation plans, whereas the Telecommunications Act provides for shared responsibility among the federal government and the states in Sections 251, 252 and 254 but in Section 253 flatly prohibits states from erecting barriers to entry and mandates that the Commission preempt any state measure that has, or may have, such an effect; and (3) in *Commonwealth of Virginia*, the EPA's interpretation ran counter to established precedent and would have resulted in an abrupt and fundamental change in the manner in which the federal government and the states had interacted for decades,

whereas here the Commission's decision in the *Texas Order* was a matter of first impression, as the Telecommunications Act had only recently redefined the roles of the federal government and the states, including the significant expansion of federal authority. *Commonwealth of Virginia* thus lends support to the Missouri Municipals' position, not to Southwestern Bell's.

In Southwestern Bell's last case, *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993), the court held that the Fair Labor Standards Act ("FSLA") applies to workers in the California Department of Transportation. Southwestern Bell's Comments at 16-17. As Southwestern Bell observes, the court found that the *Ashcroft* "plain statement" test was met because the FLSA covers "an individual employed by a public agency." *Id.* at 16-17. *Biggs* did not deal with a statute that uses the term "any" to modify the key term in issue and therefore says nothing about whether such a statute would similarly meet the *Ashcroft* test. *Biggs* is thus at most neutral as between the positions of the Missouri Municipals and Southwestern Bell.

C. NTCA Misreads the *Alarm Industry* and *Bell Atlantic* Cases

As NTCA notes, the D.C. Circuit stated in the *Alarm Industry* case that it would "'not foreclose the Commission from interpreting [the term "entity" in Section 275 of the Telecommunications Act] narrowly'" and that whatever interpretation the Commission adopted "'must be supported by more than a dictionary.'" NTCA's Comments at 4, quoting *Alarm Industry*, 131 F.3d at 1071. NTCA goes on to suggest that, in the *Texas Order*, the Commission satisfied the D.C. Circuit's demand for something more than a dictionary definition by relying on Supreme Court cases holding that municipalities are not "sovereign" or "independent" entities separate and apart from the state itself. *Id.* at 2, 4. NTCA's analysis is flawed for three reasons.

First, when the D.C. Circuit said that the Commission's interpretation "must be supported by more than a dictionary," it was referring to the Commission's failure to consider the purposes

of the Act. *Alarm Industry*, 131 F.3d at 1069. In the *Texas Order*, the Commission similarly failed to reconcile its decision with Congress's "overriding" goals of opening "all telecommunications markets to all providers" and giving consumers the opportunity to choose "from as wide a variety of providers as the market will bear." Missouri Petition at 2, 26.

Second, that municipalities may not be "separate" or "independent" from the states is irrelevant to whether they are covered by Section 253(a). As shown in the Missouri Petition, both Congress and the Commission commonly refer to municipalities as "entities," and Section 253(a) uses the expansive, unrestrictive term "any" rather than the limiting terms "independent" or "sovereign" to modify the term "entity." Furthermore, there is not a hint in the language, the legislative history, the structure or the purposes of the Act to support such a limitation on the plain language of Section 253(a).

Third, NTCA misses the point of the Missouri Municipals' reliance on *Alarm Industry*. In *Alarm Industry*, the question before the Court was whether the term "entity" in Section 275 of the Act could be read *only* in the restrictive way that the Commission had interpreted it. The Court answered that question in the negative, relying on several standard, non-technical dictionaries to prove its point. In their Petition, the Missouri Municipals noted that at least three of the definitions that the Court had quoted cover municipalities and municipal electric utilities. Missouri Petition at 28-29. Neither NTCA nor any other Opponent has contested this.

In this proceeding, the question is fundamentally different. Because "entity" in Section 253(a) is preceded by "any" – unlike the term "entity" in Section 275 – the question is whether the term "entity" in Section 253(a) is *broad* enough to encompass municipalities. Since the Incumbents do not dispute that the definitions quoted in *Alarm Industry* cover municipalities and

municipal electric utilities, that case supports the Missouri Municipals' argument and undermines the *Texas Order*.

With respect to *Bell Atlantic*, NTCA concedes that the standard of statutory construction summarized in that case governs this proceeding. NCTA's Comments at 4. NTCA contends, however, that the Commission complied with that standard in the *Texas Order* by applying "the traditional tools of statutory construction." *Id.* NTCA also argues that it was "perfectly reasonable" for the Commission to search for an "express" statement of congressional intent; that the Commission's frequent references to municipalities as "entities" are "not dispositive under Section 253;" and that the Missouri Municipals' "very lengthy discussion of the legislative history of Section 253" is self-serving. *Id.* at 4-5.

NTCA's analysis is fraught with errors. For one thing, the Commission has acknowledged in the appeal of the *Texas Order* that it did not analyze the legislative history of Section 253 in deciding the *Texas Order*. *See* APPA's Reply Comments at 2-3. Nor did the Commission perform a thorough analysis of the language, structure or purposes of the Act. Rather, the Commission simply made a policy decision to read Section 253(a) restrictively, even though the "traditional tools of statutory construction" all point in the opposite direction.

Furthermore, *Ashcroft* itself defeats NTCA's claim that it was "perfectly reasonable" for the Commission to require an "express" statement of legislative intent. *Ashcroft*, 501 U.S. at 467. NTCA's conclusory statement that the Commission's frequent treatment of municipalities as "entities" is not dispositive under 253 adds nothing of substance to the issues before the Commission. Similarly, NTCA's vague criticisms of the Missouri Municipals' analysis of legislative history merit no weight in the absence of specific examples of how they have erred.

In summary, GTE, Southwestern Bell (and the Attorney General) and NTCA say nothing that detracts from the Missouri Municipals' showing that the *Texas Order* is incorrect.

V. THE INCUMBENTS' CONFLICT-OF-INTEREST ARGUMENT IS WITHOUT MERIT

The Incumbents claim that the Missouri legislature acted reasonably in barring municipalities and municipal electric utilities from providing or facilitating the provision of telecommunications services in their communities. Otherwise, the Incumbents say, municipal entities would have conflicts of interest in their dual capacities as regulators and competitors of privately-owned telecommunications providers.

The Attorney General of Missouri acknowledges that he has no evidence of "malfeasance" by the Missouri Municipals, and he assumes that most would enter into telecommunications activities only "to serve their residents." Attorney General's Comments at 3. Yet, he surmises that, as a matter of "common sense," it would be "foolhardy" for municipalities not to "take advantage of all the benefits that come with sovereignty, regardless that it may harm actual or potential competitors." *Id.*

NTCA speculates that "perhaps" the Missouri legislature thought it unfair to allow municipalities to compete with private industry because municipalities "receive tax dollars." NTCA's Comments at 6. According to NTCA, municipalities also "generally have eminent domain privileges and access to the infrastructure and rights of way which gives them a competitive advantage." *Id.*

Citing a number of draft municipal telecommunications ordinances and alleged abuses of regulatory power by Missouri municipalities, Southwestern Bell contends that the Missouri Legislature enacted HB 620 to forestall "efforts by municipalities to gain unfair competitive

advantages through abuses of their regulatory authority." Southwestern Bell's Comments at 2-6. GTE elevates the municipal-advantage argument to the point of absurdity by arguing that municipal involvement in telecommunications will dry up private investment, GTE's Comments at 10-11, and will drive even giants such as GTE and Southwestern Bell out of the market:

> Finally, there is one additional advantage that is inherent in all municipalities and would be difficult, if not impossible, to avoid. The residents of towns like Columbia, Springfield, and Sikeston are going to know which telephone utility is the municipal utility regardless of its name. There is unquestionably a strong sense of civic pride and recognition that will exist in every municipality. Although GTE does not concede a level playing field to any municipality, even if the taxes, rights-of-way, construction permits, and the like somehow could be managed in an equitable manner, there is no way for any private corporate entity to overcome the citizens' sense of protecting their own. The Missouri legislature properly recognizes all of these competitive obstacles for private companies and has taken the proper course in adopting HB 620. The Commission should not, and may not, interfere with the state's right to manage its affairs accordingly.

GTE's Comments at 12. These conflict-of-interest arguments are deficient on numerous legal and factual grounds.

First, as the Missouri Municipals showed in their Petition, at 35-36, Section 253(b) furnishes the appropriate vehicle and context for examining a state's motives in enacting a barrier to entry. That provision reads:

> (b) STATE REGULATORY AUTHORITY - Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

The Commission has interpreted the requirements of Section 253(b) in numerous cases, perhaps most succinctly in *Silver Star*:

> Section 253(b) preserves a State's authority to impose a legal requirement affecting the provision of telecommunications services, but only if the legal requirement is: (i) "competitively neutral"; (ii) consistent with the Act's universal service provisions; and (iii) "necessary" to accomplish certain enumerated public

> interest goals. Thus, we must preempt the [measures in issue] pursuant to section 253(d) unless they meet all three of the criteria set forth in section 253(b).

In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, CCBPol 97-1, *Memorandum and Order*, FCC 97-336, ¶ 40 (rel. September 9, 1997) (footnote omitted).

Even if the Incumbents' concerns about potential conflicts of interest were valid – and they are not, as the Missouri Municipals show below – such concerns would not meet the requirements of Section 253(b). First, by prohibiting only municipal entities from engaging in telecommunications activities, HB 620 violates the principle of "competitive neutrality." By reducing the number of potential providers of telecommunications services and contributors to universal service mechanisms, HB 620 is inconsistent with the Act's universal service provisions. HB 620 also cannot be justified as "necessary" to meet any of the public policy goals enumerated in Section 253(b). The Commission made this very clear in the *Texas Order*:

> [W]e recognize that entry by municipalities into telecommunications may raise issues regarding taxpayer protection from the economic risks of entry, as well as *questions concerning possible regulatory bias* when separate arms of a municipality act as both a regulator and a competitor. We believe, however, that these issues *can be dealt with successfully through measures that are much less restrictive than an outright ban on entry*, permitting consumers to reap the benefits of increased competition.

Texas Order, ¶ 190 (emphasis added).

The Missouri Municipals also challenge the Incumbents' suggestion that conflicts of interest are matters of genuine concern. For one thing, the Incumbents rely heavily on conjecture, and the examples of abuses that the Incumbents present are undercut by the sources on which they rely.[6] Absent concrete evidence of abusive conduct, concerns about potential municipal

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[6] For example, Southwestern Bell and GTE claim that the "most egregious abuse of regulatory power" has occurred in the City of Springfield, in which the City's electric

conflicts of interest are premature and unenforceable. *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 642 (11th Cir. 1990).

Furthermore, even if municipal entities wanted to act in derogation of the rights of private industry, they would have little ability to do so. In Missouri, telecommunications services are regulated not by municipalities, but by the State's Public Service Commission ("PSC"). Public entities that wish to provide the telecommunications services from which they are not barred must apply to the PSC for appropriate certificates of authority.[7] The ability of municipalities in Missouri to manage and receive compensation for access to their rights of way are subject to the non-discrimination requirements of Section 253(c) of the Telecommunications Act. Furthermore, to the extent that any telecommunications provider believes that a municipality is seeking to impose improper or unduly burdensome requirements through a telecommunications ordinance or franchise, it can either negotiate acceptable requirements or file a preemption petition with this

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utility, City Utilities, and Brooks Fiber took seven months to negotiate a pole attachment agreement. Southwestern Bell's Comments at 4; GTE's Comments at 11. According to Southwestern Bell, the delay "apparently" occurred "because City Utilities was simultaneously demanding that Brooks Fiber lease excess capacity from the City." *Id.* The newspaper article on which Southwestern Bell relies indicates that there was no connection between leasing fiber capacity and pole attachments and that the delay concerning the latter centered around questions of capacity and safety regarding the more than 500 poles in question. Exhibit F to Southwestern Bell's Brief. Southwestern Bell's argument also makes no sense – why would City Utilities offer to lease dark fiber to Brooks Fiber if it wanted to keep Brooks Fiber out of the market?

[7] Southwestern Bell is well aware of this, as it cites the City of Springfield's application for such a certificate. Attachment I to Southwestern Bell's Brief. Southwestern Bell suggests that this application undermines Springfield's claim that it "has no desire to become a telephone company or cable company itself." Southwestern Bell's Brief at 5, quoting Missouri Petition at 22. Southwestern Bell fails to note that the application on its face states that "At this time Applicant is not [emphasis in original] seeking to offer or provide basic local telecommunications service or exchange access service." Rather, as the context makes clear, the City was seeking only to give itself the option to meet its competitors' offerings of discrete, limited services.

Commission. In short, municipalities in Missouri would not have the ability to thwart potential telecommunications competitors, even if they had any intention of doing so – which they do not.

In addition, professions of concern about municipal conflicts of interest and the supposed lack of a level playing field are particularly unpersuasive coming from behemoths such as Southwestern Bell and GTE. As Congress recognized in enacting the Telecommunications Act, the playing field tips steeply in favor of the major incumbent local exchange carriers, and it is potential competitors, not the incumbents, who need all the help they can get. The Commission made this point very well in the Interconnection Order:

> As we pointed out in our Notice of Proposed Rulemaking in this docket, the removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets, while a necessary precondition to competition, is not sufficient to ensure that competition will supplant monopolies. An incumbent LEC's existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking and loops to serve its customers. Furthermore, absent interconnection between the incumbent LEC and the entrant, the customer of the entrant would be unable to complete calls to subscribers served by the incumbent LEC's network. Because an incumbent LEC currently serves virtually all subscribers in its local serving area, an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market. An incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers.
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> Congress addressed these problems in the 1996 Act by mandating that the most significant economic impediments to efficient entry into the monopolized local market must be removed. The incumbent LECs have economies of density, connectivity, and scale; traditionally, these have been viewed as creating a natural monopoly. As we pointed out in our NPRM, the local competition provisions of the Act require that these economies be shared with entrants. We believe they should be shared in a way that permits the incumbent LECs to maintain operating efficiency to further fair competition, and to enable the entrants to share the economic benefits of that efficiency in the form of cost-based prices.

Interconnection Order ¶¶ 10-11; *see also* 61 Fed. Reg. at 45,480-81.

Finally, Southwestern Bell's and GTE's own successes therefore refute their claims that the Missouri legislature had to enact HB 620 to prevent municipalities from gaining "unfair competitive advantages." Southwestern Bell and GTE operate in numerous states, most of which do not have barriers to municipal entry like HB 620. Yet, competing with municipalities has not driven them out of business or caused private investment to dry up in these other states. To the contrary, Southwestern Bell has recently announced a $62 billion merger with Ameritech, Attachment A, and GTE has recently announced a $53 billion merger with Bell Atlantic, Attachment B. As shown in APPA's Reply Comments, Southwestern Bell and GTE claim in these announcements that the mergers will vastly enable them to compete successfully on a global scale with the world's largest telecommunications providers. It is simply ludicrous for Southwestern Bell and GTE to claim that they need anti-competitive state legislation to stay in business in Missouri.

VI. COMPETITION IS NOT "BEGINNING TO FLOURISH" IN MISSOURI

GTE contends that competition is "beginning to flourish" in Missouri, since competitive local exchange carriers were selling and billing nearly 30,000 access lines by July 15, 1998. GTE's Comments at 11 n.8. Similarly, Southwestern Bell claims that it provided a total of 22,519 lines for resale as well as 1,600 unbundled loops for facilities-based competitors by July 20, 1998. Southwestern Bell's Comments at 10 n.13. For the purposes of discussion, we assume that GTE and Southwestern Bell have grossly understated the number of competitive access lines and that their competitors were actually servicing 50,000 lines in mid-July 1998. Even that number would come nowhere near to supporting the claim that competition is "beginning to flourish" in Missouri, particularly outside the major population centers.

According to recent filings with the Commission, as of December 31, 1997, Southwestern Bell was selling and billing a total of 2,497,084 local business and residential end user lines in Missouri, and GTE was doing the same with respect to 419,914 lines. Attachment C hereto. Together, Southwestern Bell and GTE were thus selling and billing a total of 2,916,998 lines. On the inflated assumption that GTE's and Southwestern Bell's competitors were operating 50,000 lines in July of 1998, the competitors' share of the market – using year-end figures for 1997 for Southwestern Bell and GTE – would be only 1.7 percent. That is hardly a sign of "flourishing" competition, and even that figure tells only part of the story.

According to the financial reports that SBC Communications made public on July 16, 1998, Southwestern Bell's access lines have grown by 5.2 percent over the last twelve months. Attachment D. Similarly, GTE reported on July 20, 1998, that its access lines have grown by 8 percent over the same period. Attachment E. Assuming that these rates of growth applied linearly over the last year and fairly reflected Southwestern Bell's and GTE's experience in Missouri, Southwestern Bell's access lines in Missouri increased by at least 65,000 lines in the first six months of 1998 and GTE's increased by at least 17,000. *These figures show that Southwestern Bell's and GTE's competitors are actually losing ground in Missouri at a significant rate.*

In any event, even if competition was indeed flourishing in Missouri, that would not justify HB 620. As the Missouri Municipals have repeatedly noted, the overriding goals of the Telecommunications Act are to open "all markets to all providers" and to give consumers choice "from the maximum number of providers that the market will bear." HB 620 would stand as a barrier to the fulfillment of these goals, no matter what the state of competition may be in Missouri.

VII. THE SUNSET PROVISION OF HB 620 DOES NOT PROTECT IT FROM PREEMPTION

According to the Attorney General of Missouri, the Commission should not preempt HB 620 because it is only a temporary prohibition. Attorney General's Comments at 5. "It is limited in scope and the statute expressly expires on August 28, 2002. At that time, the Missouri General Assembly can assess whether competition has grown enough – whether the competitors have become fit enough – that the slope of the field favoring municipalities is no longer an obstacle to good, competitive business." *Id.* There are two problems with this analysis.

First, in *Silver Star*, ¶ 39, the Commission held that a temporary prohibition can, for all practical purposes, be an absolute prohibition. The Commission also observed,

> The 1996 Act contains numerous deadlines requiring the Commission and state commissions to complete with dispatch various tasks implementing the 1996 Act. *See, e.g.*, 47 U.S.C §§ 251(d)(1); 251(f)(1)(B); 252(e)(4); 254(a); 257(a); 271(d)(3); 276(b). By requiring relatively swift administrative implementation of the pro-competitive provisions of the 1996 Act, these deadlines highlight the substantial extent to which Wyoming's statutory delay of competition conflicts with Congressional intent.

Silver Star, ¶ 39 n.103.

Similarly, in *AT&T Telecommunications of the Southwest, Inc. v. City of Dallas*, __ F.Supp. __, 1998 WL 309145 (N.D. Tex.), the court found that even the time it would take for a party to go through a preemption proceeding before the Commission could cause irreparable harm to the competitive position of a telecommunications provider. In that time, the court reasoned, the provider would lose existing customers as well as potential new ones and could also suffer damage to good will. *Id.* If the time it takes for a preemption proceeding to run its course can

cause irreparable injury, as it did in the case of ICG's challenge of the *Texas Order*,[8] surely the four-year delay imposed by HB 620 would have that effect.

Second, as the Attorney General notes, the four-year delay could well turn into one of longer duration if the Missouri legislature decided to extend it. Given the Attorney General's position that a municipal utility is "an easy monopolist" because of all the advantages it supposedly possesses, and given Southwestern Bell's and GTE's dire professions of concern about the ability of municipalities to drive them out of business, the Commission can have little confidence that the Missouri legislature will allow HB 620 to expire.

In enacting the Telecommunications Act, Congress sought to bring competition to all telecommunications markets as rapidly as possible. Every day that HB 620 exists frustrates that intent. The Commission should preempt that measure now, in terms clear enough and forceful enough to prevent similar measures from being enacted in Missouri or elsewhere.

VIII. THE COMMISSION SHOULD MAKE CLEAR THAT THE TERM "ANY ENTITY" IN SECTION 253(a) APPLIES TO MUNICIPALITIES, AS SUCH

In their Petition, the Missouri Municipals noted that the legislative history of Section 253 makes it crystal clear that Congress, at the very least, intended to protect municipal electric utilities from state and local barriers to entry. The Missouri Municipals also argued that, to achieve that objective, Congress must have intended to include municipalities, as such, within the meaning of "any entity" in Section 253(a), because municipal electric utilities typically derive their authority from, and operate as departments or offices of, the municipalities in which they are located. Missouri Petition at 11.

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[8] Frustrated by the Commission's delay, ICG withdrew its petition, abandoned its plans to compete with Southwestern Bell in San Antonio, and turned its attention to other states.

In their comments, Southwestern Bell and GTE confirm the Missouri Municipals' point about the relationship between municipalities and municipal electric utilities under Missouri law. Southwestern Bell's Comments at 11-13; GTE's Comments at 6 n.5. They, however, would use this point to withhold the protection of Section 253 even from municipal electric utilities. *Id.*

The Missouri Municipals submit that Southwestern Bell's and GTE's arguments underscore the need for the Commission to make clear that Section 253(a) covers both municipalities and municipal electric utilities.

IX. CONGRESS DID NOT INTEND SECTION 253(a) TO PROTECT ONLY PRIVATE ENTITIES FROM STATE AND LOCAL BARRIERS TO ENTRY

For the reasons set forth in Section III of APPA's Reply Comments, which the Missouri Municipals adopt and incorporate, the Commission should reject Southwestern Bell's argument that Congress intended Section 253(a) to protect only entities in the private sector from state and local barriers to entry.

X. CONCLUSION

For the reasons set forth in the Missouri Petition and in these reply comments, as well as in APPA's opening and reply comments, the Commission should promptly preempt HB 620 and declare it null and void.